

# Special Edition: South of the Border

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The graffitied ruins of the bobsled track from the Olympic Winter Games of 1984 above Sarajevo

I've been traveling with my daughter in the Western Balkans for the last two weeks, most of the time in Bosnia, which is (besides a computer crash somewhere in the middle of deep Herzegovina last weekend, don't ask) the reason I skipped my weekly editorial last time. I hope you are not mad with me for that. To make up for that failure, this one will be all the lengthier, for better or worse. I'll tell you about the encounters and insights we had in Bosnia which hopefully you'll find as interesting, moving, mortifying and horizon-widening as we did. If you sigh now: oh please, come on, why should we bother if those unkempt Bosnians still don't get their act together a quarter of a century after their war has finished, well, then I'd be particularly sorry if you stop reading now. For if there's one thing I've learned on this journey it's that the snotty mixture of weariness, complacency and sheer culturalist ignorance with which we have become accustomed to look at the situation beyond our south-eastern external border from within the EU is a huge problem, indeed. And our very own, at that, too.

## Ethnicity v. citizenship

The constitution of Bosnia-Herzegovina has, as is well known, emerged under highly peculiar circumstances, namely as part of an international peace treaty, the Dayton Agreement of 1995, signed by the then heads of state of Serbia, Croatia and Bosnia-Herzegovina and witnessed and supervised by the international community of states. The consequence of this is, on the one hand, that the former warring parties find themselves as "constituent peoples" in the constitution: This is a state of three ethnic groups and not a state of 3.5 million free and equal citizens. In 2000, the Bosnian Constitutional Court declared equal representation of the three ethnic groups to be a [basic principle of the Bosnian Constitution](#), overarching all state and sub-state levels. Thus any political dispute is pre-formatted as a dispute over whether the Serbs/Croats/Bosniaks have too much or too little to say, respectively. It doesn't pay politically to come up with proposals to fix the country's numerous and truly dramatic problems. Parties and politicians are elected for their promise of protection to their respective ethnic group against the other two, and of as large a slice of the state pie as possible in the form of jobs and contracts. The entire institutional setup of the country is geared to this.

+++++A Note from the University of Frankfurt/Main+++++

### ***Weimar Moments: Constitutionalizing Mass Democracy in Germany, Italy, Spain, and Beyond – Call for Papers***

*The Weimar Constitution was among the first constitutions that aimed at organising a mass democracy in which the social question played a key role. Such "Weimar Moments" and their significance for the current European constitutional crisis will be at the centre of a workshop in Madrid, 13-15 November 2019. Please see the full Call for Papers [here](#). Deadline: 1 June 2019. A co-operation between scholars from U Frankfurt, U Madrid, U Valencia, U Ferrara and MPI for EU Legal History.*

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Moreover, the fact that the Bosnian constitution was drafted in Dayton and not in Bosnia entails a heavy presence of the international community which has been watching over the functioning and implementation of the Dayton compromises, including, if necessary, their enforcement. This task is carried out by a High Representative who resides in Sarajevo in a walled UN building near Vrbanja Bridge and, in theory at least, is bestowed with almost dictatorial powers, from enacting laws to dismissing presidents and nullifying constitutional court rulings. The current holder of this office, a melancholic-looking elderly gentleman from Austria named Valentin Inzko, has not made use of these powers for over a decade. Even if he wanted to, he'd probably lack the necessary support from the international community. "Local ownership" has been the motto for these ten years: Bosnia should grow up and take responsibility for itself.

However, this policy has had rather the opposite effect, so far. Bosnia is becoming less and less mature and assuming less and less responsibility. Inzko was originally

only supposed to stay for six months, by which time the Dayton Agreement should have been implemented and the international presence phased out. Those six months became a decade, and there is still no end in sight. The root of the misery is not the bad character of the political actors (rather vice-versa, really) and certainly not any cultural-historical peculiarities along the lines of "well, you know, the Balkan and it's ancient hatreds". The root of the misery is the constitution. This country is constitutionally programmed for dysfunctionality and corruption. The international community has handed this hopeless constitution to the Bosnians, and now, as the consequences become apparent, would like to just walk walk away from the whole mess. It is as fatal as it is consistent that the Bosnians, especially the young and well-trained, are in large numbers drawing the same conclusion and emigrate by tens of thousands to Germany, Austria, Ireland, Sweden and the USA.

## **Irma's story**

Irma Baralija is a teacher in Mostar, a town 70 km southwest of Sarajevo, often visited by tourists for its spectacular Ottoman bridge over the Neretva River. She has a small child of one and a half years and a husband who is a software engineer and could find a job anywhere. She can think of at least six friends who have already obtained work visa for Germany. Mostly families with small children, like hers: "When you're alone, you fight for yourself. But when you have a kid, you get to face the system." The child needs a doctor's appointment: To get it, you have to pay. The child is enrolled in a school in which the teachers all answer to the local ethnic party in power and give their pupils a constant nationalist brainwash. "I survived all this," says Irma. "But I want a better life for my child."

Five years ago, when citizens everywhere in Bosnia took to the streets and protested, Irma was among them. Mostar had been the scene of a horrible battle during the war when Croatian troops rained shells on the Ottoman Old Town and bombed the famous Neretva Bridge until it collapsed into the river. Since then the city has been ethnically divided into a Croatian western part and a Muslim eastern part. But the city administration with its mayor is in the hands of the Croatian Nationalist Party HDZ, which wants to separate Western Herzegovina from the Bosniak-Croat Federation and make it its own exclusively Croat "entity" with Mostar as its capital. (The correct term for the two parts of the country, which for constitutional reasons mustn't call themselves states, is indeed: "entity").

Irma wants to make a difference. She wants to get elected to the city council. But she can't. Because there is no city council. Not for seven years now. In 2008 the then High Representative Paddy Ashdown had ordered a special municipal constitution for Mostar, according to which the city was to be divided into six districts, each of which would elect an equal number of deputies to the city council. The Croats considered this an outrage and successfully complained to the Constitutional Court: Ashdown's statute was declared null and void, and the parliament in Sarajevo was tasked to amend the electoral law accordingly. Which it didn't, like so many other tasks before. The electoral term of the city council expired in 2012. Since then there has been no city council at all – due to the lack of a law according to which it could be elected. The HDZ-dominated city administration is rather comfortable with



this situation as it allows the mayor to spend the city budget of around 30 million euros and without any oversight and transparency to line the pockets of their ranks and files. In return, Irma Baralija and some 100,000 other citizens of this city are deprived of their active and passive voting rights.



Mostar

Irma teaches at the United World College in Mostar, an international school where students from Bosnia and all over the world can take the International Baccalaureate. No municipal school would employ her as she is neither affiliated with the HDZ nor with the Bosniak nationalist party SDA. Through the UWC, however, Irma came into contact with a lawyer, mother of one of her students, who took her case and filed a lawsuit on Irma's behalf before the European Court of Human Rights in Strasbourg. In last October's parliamentary elections, Irma ran for the Federation parliament for the new multi-ethnic *Naša Stranka* party, and she got enough votes to make it plausible that her candidacy for the city council would indeed have been successful. So, that could actually work.

What if it does? Irma has no illusions. "If I win this case, nothing will happen. A court judgement means nothing in this country. But I want people to talk about what is happening here in Mostar!"

## A state of perpetuated illegality

The constitutional crisis in Mostar has been going on for seven years, but it is just one of many that the Bosnian political system has produced in recent years. The most prominent example is the ECtHR judgement *Sejdić and Finci* of 2009, in which the Strasbourg Court found the Bosnian Constitution itself in violation of the European Convention of Human Rights: According to the constitution, only citizens who identify themselves as Croats, Serbs or Bosniaks can be elected to the three-member state presidency. This discriminates against Jews, Roma and all citizens who cannot or do not want to fit themselves into one of these three ethnic boxes. Since then, Bosnia has been convicted three more times in Strasbourg for the same reasons. The Croats, in particular, insist that a Croat must always be represented in the state presidency, no matter what, and therefore block any change to this state of perpetuated illegality. Nobody believes that this will change anytime soon.

In general, there are more and more judgments also by Bosnian courts which are simply ignored by the authorities on the state and sub-state levels. The state of perpetuated illegality has by now also infected the state institutions itself: in 2016 the Constitutional Court declared the election procedure for the second chamber of the Bosnian-Herzegovinian Federation [unconstitutional](#). This ruling has not been implemented either. Last October's elections took place on an unconstitutional basis in that respect. In the Republika Srpska, deliberately ignoring rulings of the Constitutional Court in Sarajevo has become a [successful mobilization and power-maintaining strategy](#) of the secessionist/nationalist party/crime-gang SNSD under its epically villainous, genocide-denying kingpin Milorad Dodik.



A stall near the Belgrade bus station selling Serbian war-criminal and militia paraphernalia

If there is one actor who should have both the interest and the means to put an end to the state of perpetuated illegality in Bosnia, it is the European Union. The prospect of EU accession is the only thing which all Bosnian political forces can agree upon across all ethnic groups and interests. All the greater is the disappointment of many Bosnians at how negligently the EU uses its possibilities. All our interlocutors agreed in their bottomless disappointment with the EU – not because it applies its accession criteria too strictly, but on the contrary: because it lets the Bosnian politicians get away with far too much far too cheaply. The EU no longer even insists on the implementation of the *Sejdić/Finci* ruling. "Bosnia wants to become a member of the EU, but 100,000 citizens of Mostar don't even enjoy the most basic democratic rights," says Irma Baraliija. Instead of welcoming the Bosnian politicians to Brussels for ever more fruitless talks and giving them foto-ops for the TV audience at home, the EU should just say: Fix this right away, or else the accession process is over. "There are simply things that are no longer acceptable in Europe in the 21st century," says Nedim Ademović, a human rights lawyer from Sarajevo. Whether a court decision is to be implemented or not is not something that can be discussed or negotiated. "This is not fair to the citizens of Bosnia-Herzegovina".

The Bosnian state of perpetuated illegality is not just a matter of morality for the EU itself. In January, an online magazine from Sarajevo caused a [sensation](#) with an undercover investigation that proved that anyone who puts 1250 Euros on the



table will receive a certificate to be a trained nurse from an officially recognised educational institution within 17 days. Not a fake certificate, mind you. A real one. With which you can get a work visa in Germany without any problems. Trained nurses are in high demand on the German labour market. How many Bosnians who care for the elderly and sick in Germany have actually received any training in their profession? If only one knew. "Do we want to export the rule of law, or do we import crime?" says Valentin Inzko, the High Representative. "We have to make up our minds."

## Jasmin's story

Bosnia-Herzegovina is not in the EU. But it's not *not* in the EU either. It is somewhere in between – some sort of a EU frontier march, neither inside nor outside, a financially and politically dependent territory where and through which the EU regulates its external border. There is no better place to study what this means than Biha#, a small, idyllic little town on the shore of the magnificent, brilliantly blue river Una in the far north-west of the country. Bosnia protrudes like a wedge-shaped funnel into the EU, up to a point which is not very far from the Schengen border with Slovenia. Biha# and Velika Kladuša a little further north are the mouth of this funnel. This remote place is where the Balkan route of migration nowadays meets the EU's external border.

Before we leave for Biha#, we meet with Jasmin Hasi#, a young political scientist, in a café on Marshall Tito Street in central Sarajevo. His mother and grandmother live in Biha#, his brother is a public prosecutor there. We ask him to tell us what the mouth of the funnel looks like from the perspective of those who live there.

Last year, says Jasmin, the atmosphere in Biha# towards the migrants was still overwhelmingly positive. It was summer, near Croatia hastened from victory to victory at the football World Championship, and it was Ramadan where people are friendly to each other anyway. Nobody was very worried about the tents in the parks and the many families with the cute children who kept appearing and vanishing over night. In autumn, with the general elections nearing, people had other things on their minds, as well.

But then came winter. It can get rather cold in Biha#, in the Plješevica mountains towards Croatia the snow stays well into spring. The migrants no longer kept to the parks and abandoned buildings, says Jasmin. They broke into houses. His mother suddenly found a dozen sleeping men in her hallway when she left her house in the morning. The migrants made fires in the middle of the city to warm themselves. Then there was the story about the duck: Biha# with its enchanting riverscape is very proud of its ducks. One was caught, slaughtered and roasted by migrants one night, local television reported. There were security issues. Fights broke out between different migrant groups. Stabbed migrants were found in the woods, no-one knowing who they were and what violent fate they met. The families with the cute children were more and more replaced by sinister-looking young men.

++++A Note from the University of Leipzig++++

*The Chair for European Law, Public International Law and Public Law reminds of its first edition of the **International Summer School on Human Rights Protection under the ECHR** in summer 2019. This Summer School combines the academic expertise of an alma mater which is both rich in tradition while at the same time being a modern, forward-thinking institution with its unique location in a vibrant city. It welcomes students and professionals from all over the world to analyse and discuss current developments and recent judicial decisions in order to impart a profound knowledge on the protection of human rights under the application of the European Convention on Human Rights. Particular focus will be put on procedural and practice-oriented questions. The sessions will cover a wide range of topics, from Terrorism, Slavery, Children's Rights, War Crimes, Judicial Independence, the Freedom of Religion, Data Protection Rights, and "Push backs" at EU external borders and so forth. For the whole programme and list of speakers please click [here](#). Deadline for registration is **30th of April 2019**. The fee is **250,- Euro**.*

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The mood has changed, says Jasmin. The city is now divided into a part that is scared by the migrants, and a part that profits from them. Hairdressers, cafés, bakeries that serve migrants are avoided by the locals and vice versa. "My mother doesn't go out at all any more. She's in her 60s, and her own mother lives with her, she's 85." Every morning she still finds strangers sleeping in her hallway. From the far-away capital in Sarajevo, Biha# has no help to expect. No one in the rest of Bosnia cares much about the problems of Biha#. Up north, in Velika Kladuša, the situation is even worse – and the solidarity within Bosnia even less. The inhabitants of this remote corner are considered pariahs in Bosnia anyway since in the war the local Muslim militia had joined forces with the Serbs against their own brothers in faith.

Is the border with Croatia shut? Is the mouth of the funnel blocked? Not according to what Jasmin believes. Otherwise the number of migrants would rise in Biha#, which it doesn't, being quite stable at 5-7000. "They are crossing in ways no-one knows about." Some, says Jasmin, suspect that the solution to the mystery might be found in the tunnel system of the huge, abandoned military airfield that the Yugoslav leader Tito once had built in the mountains above Biha# – a gigantic underground facility like from a James Bond movie, which in fact exactly straddles both sides of the Bosnian-Croatian border. The Yugoslav army had the entire facility blown up when it withdrew from the predominantly Muslim region at the beginning of the war. But who knows, says Jasmin. Perhaps there are secret entrances, accessible from the basement of some outwardly completely inconspicuous house in Biha#, and the same in Željava on the Croatian side, similar to the camouflaged entrances to Tito's nuclear bunker in Konjic? Biha# was a large air force garrison back in Yugoslav times; perhaps there are two or three people who still know about such secret accesses, if they exist at all? Who knows?



## **Khaled's story, and Diaa's and Nizar's story, and Hussein's story**

On the outskirts of Biha#, opposite the local sports facilities of Bori#i, there is a small park with a pine grove, and in it a large building made of concrete and unrendered hollow bricks which until recently was an abandoned student residence. Many of the refugees and migrants who had come to Biha# last summer had settled in this park and building. Today the park is nicely tidied up, the tents have disappeared and so has the garbage, the building has been reasonably repaired and is run by the International Organisation of Migration as the migrant camp of Bori#i.

In the park, we find a lonely man sitting on a bench, in front of him a pile of luggage. As we approach him, he calls his 12-year-old daughter Iman, who plays with other children on a basketball court below the park. The man, his name is Nizar, speaks no English at all. Another man named Diaa joins us and takes over the conversation: "Bosnia no good", we learn, "Croatia police no good. Fight! Croatia Ali Baba!" Diaa shows us how they stomped on his mobile phone to destroy it. Nizar and Diaa are Kurds from Iraq, it turns out. Nizar had fought with the Peshmerga against the IS. Diaa shows me a scar on his head and makes steering movements with his arms. Car! Boom! Daesh! Suicide bomber? He nods. "Arabic say: Kurds go!" Where are the mothers of the children? Diaa shakes his head. "I don't have mother," says Nizar's son Haval, nine years old. The two men spent the last two nights with their children on the basketball court. "Bosnia no good. IOM no good. Iraq good! Here no good." Where will they go now? Back to Serbia. "Serbia good. Give me clothes, give me food." Then maybe Romania, Nizar adds. In the end: Germany. "School for children". Iman and her brother Haval laugh. "Only Germany!"



Diaa (2nd from left), Nizar (3rd from left), to the right on the bench Iman and Haval.

More refugees have gathered around us, attracted by the fact that someone is interested in listening to their stories. A young man with a wool cap and good English introduces himself as Hussein Hamiya, a Palestinian from Homs in Syria with a Master Degree in International Law from Moscow. He had been in Greece for three years until his asylum application had been rejected. His twin brother had reached the Netherlands a while ago and now, a month ago, had been granted citizenship. He can now travel wherever he wants. "He said: I will visit you. But I said: No!"

Khaled Alzrouny, an electrician from Iraq, has a cousin in Germany. He has been in the camp Bori#i for three months. In the last few days the behaviour of the police in Biha# has changed, he says. When he went shopping in the city, a policeman stopped him and ordered him to return to camp Bori#i immediately. "All refugees are criminal," the policeman said. There are some in the city who are criminal, Khaled says. Algerians, Moroccans. But not him. And neither his son Ali, 11 years old. The other day he wanted to take Ali to a burger joint. The owner kicked them out. What should he do in Bosnia? Where should he go?

13 times, says Khaled, he and Ali had tried to cross the border. The last time, two weeks ago, they nearly succeeded. They had crossed Croatia and reached Slovenia after ten days of walking. Ali's feet were swollen, says Khaled and shows with his hands: "big like this! They were picked up 30 kilometres behind the Slovenian border. The Slovenian police said they would be taken to the capital Ljubljana. He was happy, Khaled says. He believed they had made it. But instead they were forced

together with 60 others – Algerians, Moroccans, Pakistanis – with dogs and beatings to enter a bus that drove them back to Croatia. There the police photographed them like criminals, took their papers and telephones, beat them with sticks, made them wade into a river, and then, after all had reached the other shore, a policeman threw them a bag with their passports and phones, all of the phones destroyed. They were back in Bosnia.

That was against the law, says Hussein, holder of a Master of International Law degree from Moscow. The Slovenian police is in violation of the law when they push refugees back to Croatia without listening to their cause, and the Croatian police is in violation of the law when they push them back to Bosnia, let alone beat them, rob them and destroy their property. They are. Everyone here knows that. Croatia no good. Croatia Ali Baba.

While we talk, a van leaves the Bori#i camp, inside a woman and a man, both dressed in funny clown costumes, and a horde of children running after the car. Three boys cling to the rear window wiper. The car stops, the clown woman in the passenger seat gets out and scolds the boys, they run away – one of them, maybe five years old, straight into the street, almost in front of a passing car. The driver of the van, his red clown's nose still on his face, gets out, ashen, and exhales a curse in Italian. That was close.

Meanwhile Khaled makes me a suggestion. I am a journalist, right? Why don't I buy myself a backpack and walk off with them across the border and see for myself?

I should, I answer. But unfortunately I can't. Because I'm just making a trip here with my daughter.

Khaled is standing in front of me, his arm wrapped around his skinny son Ali, and looks at me while I realize what I just said.

*We thank Nedim Ademovi#, Valentin Inzko, Zlatiborka Popov Mom#inovi#, Jasmin Mujatovi#, Mirza Smaili# and Ajla Srdi# for valuable background information and analysis.*

## Ticking Clocks

While we were away, plenty has been going on on Verfassungsblog and in the world. Next week, we expect an analysis of the latest developments between the EU and its still-member **UK** in terms of EU law by TOBIAS LOCK. [STEFAN THEIL](#) explains why the proposal by the Oxford law professor John Finnis to force a no-deal Brexit by prorogation of Parliament until after 12 April was blatantly unconstitutional.

In **Germany**, a completely different time bomb is ticking, namely the Federal Constitutional Court's deadline to reform the unconstitutional land tax law by the end of this year. At the moment there is a dispute about the draft bill of the Federal Minister of Finance, Olaf Scholz, under the keyword "*Länder* opening clause". [ANNA LEISNER-EGENSPERGER](#) explains what that is about and sees a "low point

reached in the discussion on federalism in Germany: the participation of the *Länder* is only a distribution mass in the negotiation arena of federalism".

A major topic of excitement in **Germany** was the draft bill to promote organ donation. In his analysis, [STEFAN HUSTER](#) believes that much of the fuss made about the law is greatly exaggerated.

In the infringement proceedings about the compulsory retirement of Supreme Court judges in **Poland**, CJEU Advocate General Tanchev has handed down his opinion to the result that Article 19 TEU indeed prevents Member States from fiddling with the independence of their judiciary. [PIOTR BOGDANOWICZ](#) is mostly satisfied with the outcome, unlike [RÉNATA UITZ](#) with the opinion of the Venice Commission on the new administrative court system in **Hungary** which is supposed to be kept under tight control of the Ministry of Justice.

In the **USA**, there are discussions among Democrats as to whether the conservative majority in the Supreme Court, cemented by the Republicans with unfair means, should be overturned by means of a "court packing scheme" in the event of an Democrat election victory. [MARK TUSHNET](#) explains the background and implications of such a measure.

In the Swiss canton of **Berne**, a new police law was recently passed by referendum at the expense of foreigners, poor people and minorities, as criticised by [ANDREAS GUTMANN](#) and [FLORIAN WEBER](#).

[ANNA LÜBBE](#) is unhappy about the recent attempt by the CJEU, in its *H & R* judgment, to clarify the confusing conditions for the transfer of asylum seekers under the Dublin rules.

The same is even more true for [DIMITRY KOCHENOV](#), who considers the CJEU ruling *Tjebbes* about the loss of **Dutch** citizenship for long-term expatriates to be downright farcical: "... the Court steers clear of the core ideas underlying the issue at hand, as I explain below outlining a selection of ten tragic misunderstandings earning this case a solid place in the hall of fame of the most intricately dubious tours de force of the highest Court in Europe."

In the forthcoming elections to the **European** Parliament, in several member states there will be members elected according to electoral laws which don't meet democratic standards. [ANDRÁS JAKAB](#) calls on the EP to defend itself against its own infiltration with democratically insufficiently legitimated MEPs.

After the failed electoral reform, the **German** Bundestag threatens to become a monster parliament surpassed only by China's National People's Congress in number of deputies. [SOPHIE SCHÖNBERGER](#) considers it advisable to reconsider the principle of personalised proportional representation entirely.

Parliamentary elections have taken place in **Thailand**, but the military retains control. [THOMAS DOLLMAIER](#) explains the background.



## Elsewhere

[MENELAOS MARKAKIS](#) believes that the EU is well prepared to defend itself against a "Trojan horse" scenario after the provisional extension of **British** membership.

[STEFAN MICHEL](#) takes a look at the new draft law on the right of the press to information against federal authorities in **Germany**.

[CORINA HERI](#) reports on a new ECHR ruling on the protection of rape victims in a **Romanian** case.

[SEVINÇ BERMEK](#) sees Erdoğan's grip on his country loosen after the local elections in **Turkey**.

[ERIKA HARRIS](#) considers the election victory of Zuzana Čaputová to be only the beginning of the struggle for the future of **Slovakia** against the populist and nationalist forces.

[TARUNABH KHAITAN](#) sees **India** as a border case in terms of democratic backsliding.

[ROSELINE LETTERON](#) discusses the *Conseil Constitutionnel's* ruling on the recent restrictions on freedom of assembly at the violent Yellow Vest demonstrations in **France**.

[GIOVANNI BOGGERO](#) criticises the ruling of the **Italian** Constitutional Court on the municipal debt brake.

Phooh. That was a very, very long editorial. Congratulations on your stamina! I hope you enjoyed it. All the best, and take care,

Max Steinbeis

